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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 718

FETTIG CANNING COMPANY,
Petitioner,

v.

WILLIAM E. STECKLER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM C. BACHELDER,
EUGENE M. FIFE, JR.,
BACHELDER, BACHELDER & FIFE,
Attorneys for Petitioner.

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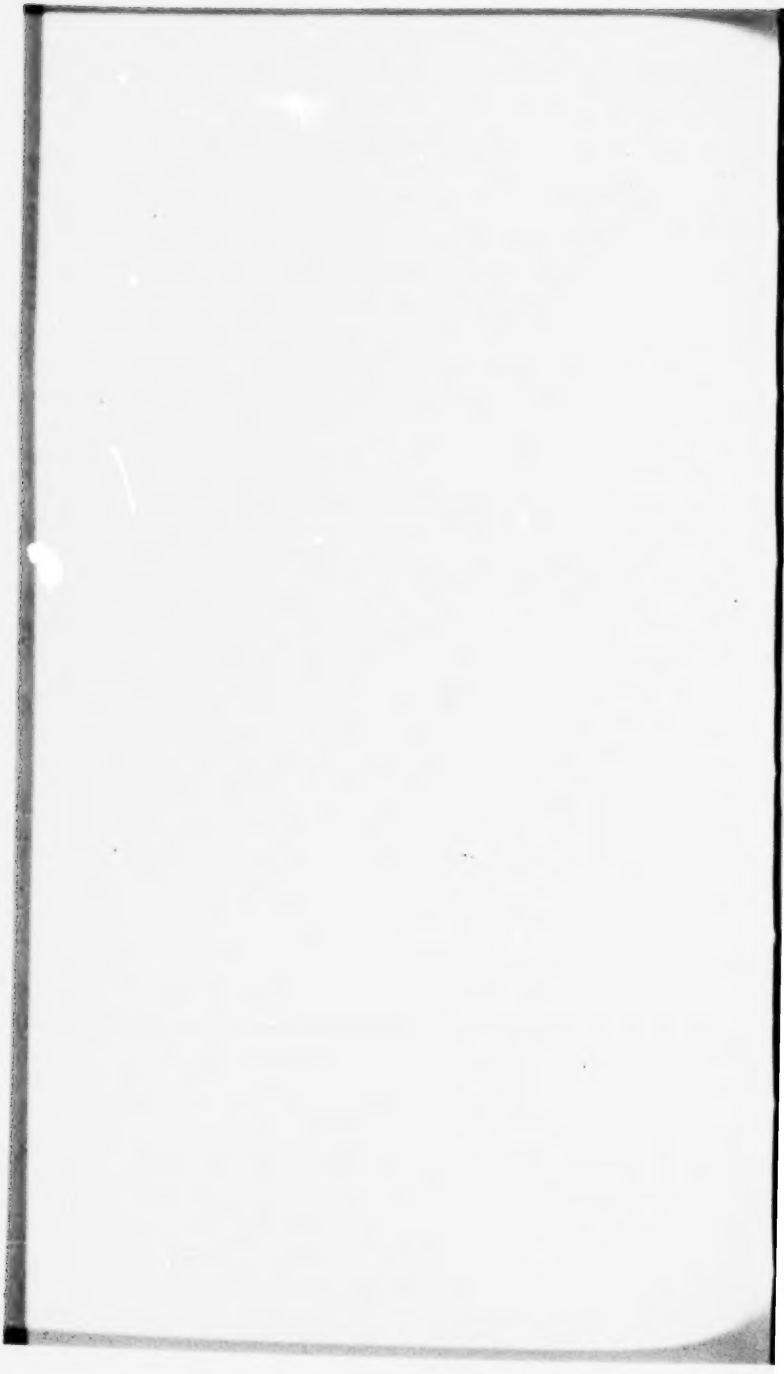

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WILLIAM E. STECKLER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Fettig Canning Company prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the 7th Circuit entered in the above entitled cause on March 12, 1951 denying a petition for writ of mandamus.

Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is unreported as yet, but will be found at page 11 of the record herein.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 2101(c).

Questions Presented

The questions presented are these:

I

Is a claimant in a libel brought under the Federal Food, Drug and Cosmetic Act (21 U. S. C. A., 334) entitled to invoke the provisions of 28 U. S. C. A. 1404(a) and transfer the case to any district where the goods "might have been seized"?

a. Does the fact that the goods were not seized until they reached their final destination bar the transfer to the district where they were first subject to seizure?

b. After a claimant appears to defend the libel is the case a civil action under the provisions of 28 U. S. C. A. 1404(a)?

c. Would a district court to whom such case was transferred have the power to enforce its decree upon the Marshal in the district where the goods were held?

II

Will the consent of both parties confer the power to decide the case in the district to which a libel under 21 U. S. C. A. 334 has been transferred?

Summary Statement

This is an original action brought in the United States Court of Appeals for the Seventh Circuit to mandate the Judge of the Southern District of Indiana to retain jurisdiction of two cases transferred from the Eastern District of Missouri. (R. 1).

The two cases transferred were originally brought in Missouri under 21 U. S. C. A. 334 to condemn certain canned goods alleged to have been unlawfully introduced into inter-

state commerce in the Southern District of Indiana and seized in Missouri. (R. 4).

In both cases petitioner appeared and claimed the goods and petitioned for transfer to Indiana under 28 U. S. C. A. 1404(a). This transfer was granted and the District Attorney entered in the record a statement that there was no objection to the transfer. (R. 7).

Pursuant to the above proceedings the Eastern District of Missouri ordered the cases transferred to the Southern District of Indiana. (R. 8-9).

The Judge of the Indiana Court assigned the cases for trial without objection. (R. 10).

After a jury was impaneled and evidence heard, the Court of its own motion discharged the jury and ordered the cases remanded to the Missouri District. (R. 10-11).

March 21, 1951, the Seventh Circuit Court of Appeals denied petitioner's request to mandate the Judge of the Southern District of Indiana to retain jurisdiction of the cases. (R. 11).

Reasons for Granting Writ

I

The Circuit Court of Appeals has decided an important question of Federal law which has not been and should be settled by this Court, to-wit:

a. It has decided that a claimant in a libel suit brought under the provisions of the Federal Food, Drug and Cosmetic Act (21 U. S. C. A. 334) cannot invoke the provisions of 28 U. S. C. A. 1404(a).

b. It has decided that a judge on transfer from another district has no power to enforce his decrees against the Marshal of the original district.

c. It has decided that where goods subject to seizure from the time of their entrance in interstate commerce were not actually seized until they reached their desti-

nation, the action could not have been brought in any other district than the one where they were actually seized.

II

The Circuit Court of Appeals has rendered a decision in conflict with a decision of the Third Circuit Court of Appeals on the same matter, to-wit:

Transfer under 28 U. S. C. A. 1404(a) is a question of venue and can be waived by the parties.

Paramount Pictures v. *Rodney* 186 F(2), 111.

WHEREFORE, petitioner prays that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Seventh Circuit, and that the decision of that Court in this case be reviewed by this Court.

WILLIAM C. BACHELDER,
EUGENE M. FIFE, JR.,
BACHELDER, BACHELDER & FIFE,
Attorneys for Petitioner.

STATE OF INDIANA,
County of Marion, ss:

William C. Bachelder, being duly sworn upon his oath, says that he is one of the attorneys for the Petitioner in the above entitled cause and that the statements of fact herein contained are true.

WM. C. BACHELDER.

Subscribed and sworn to before me a Notary Public in and for said County and State this 17th day of April, 1951.

GEORGIA M. KIDWELL,
[SEAL.] *Notary Public.*

My Commission expires March 15, 1955.

BRIEF

In Support of Petition for Writ of Certiorari

I

The Circuit Court of Appeals has decided an important question of Federal Law which has not been and should be settled by this Court.

A. Section 1404(a) has been interpreted by this Court as a remedial statute to relieve litigants from the expense of transferring their witnesses, records, etc. to a foreign jurisdiction, which expense makes it difficult and perhaps impossible to protect the rights of litigants and to that extent denies them due process of law.

An action under the Food, Drug & Cosmetic law is a civil action. This Court has discussed this matter and decided that wherein any libel under the Food, Drug & Cosmetic Act has been brought and a claimant appears and asserts an ownership in the goods the case becomes a normal civil action and is subject to the rules of civil procedure even though the original proceeding was in admiralty. The words of the Supreme Court are as follows:

> "We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process in rem, then giving the case the character of a law action with trial by jury if demanded, and with the review already obtained in actions at law."
>
> *443 Cans of Frosty Egg Product* v. *U. S.*, 226 U. S. 172-183, 57 Law Ed. 175-179.

Petitioner believes that it is obvious from the above holding of this Court that the proceeding in rem only applies to the apprehension of the offending article and that as soon as a claimant appears it becomes an ordinary civil action.

B. The Circuit Court of Appeals stated in its opinion (R. 15) that the trial Court on a transfer could not make its decisions and decrees enforceable against the Marshal in another district.

This is directly refuted by the many actions that have been transferred under the provisions of the Food, Drug & Cosmetic Act which provides that in case two or more seizures have been made in different Districts, they can be consolidated for purpose of trial at a convenient District.

21 U. S. C. A. 334(b) & (f-2).

This provision has been frequently applied in food cases and the petitioner knows of two cases wherein such action was taken. In the case of *Salamonie Packing Company* v. *U. S.*, 165 Fed. 2d, 205, seizures were transferred from the Northern District of Ohio, Eastern Division, the Western District of Pennsylvania, Northern District of Ohio, Western Division, to the Eastern District of Missouri. All of these cases were consolidated in the Eastern District of Missouri, although the goods remained in the custody of the Marshals in the various other Districts. The Judge of the Eastern District of Missouri rendered a judgment of condemnation and its judgment was complied with by the Marshals of the various other Districts.

Petitioner also knows of similar type of action in Florida where seizures in various Districts were transferred for trial to the Northern District of Florida from the Districts of Maryland, Pennsylvania and California. There are various other cases wherein the consolidation and transfer of multiple seizures have been removed for trial to Courts other than that wherein the goods were seized and the trial judge in every instance had no difficulty in having his decree enforced by the Marshals in foreign Districts. The statute itself indicates that Congress did give the power to District

Courts to enforce their decrees against Marshals in other Courts.

C. Both the wording of the libel and the wording of the Food, Drug & Cosmetic Act provides that goods violating the law are subject to seizure when introduced in interstate commerce and from then on wherever they may be found. It is petitioner's contention that these goods could have been seized in Indiana where they were introduced into commerce and therefore the action might have been brought in Indiana.

It is immaterial in so far as the purposes of 1404(a) are concerned whether the goods were seized where they could have been seized first or after they arrived at their destination. The purpose of 1404(a) is to permit a defendant or a party litigant to remove the case to a convenient forum, that is, to relieve him of the obligation to carry his witnesses, records, etc. to a far distant place of trial, thereby adding an expense which in many instances amounts to more than the value of the goods seized and in effect constitutes a denial of due process of law. The fact that the goods could only be seized where they were found should not affect the right of the claimant to have the trial removed to a convenient place for himself, his witnesses and his records. The purpose of the Act was to relieve litigants from this burden of trying their affairs at a distance and is one of the fundamental principles of the development of local Courts both in English and American law.

It may be recalled that originally under English law the litigant had to follow the Court with his witnesses and have his case tried wherever the Court might be sitting. The Court at that time was the King. In order to mitigate this expense against litigants, local Courts were created so that litigants would not be forced to follow the King all over the British Isles.

In our jurisprudence the theory has constantly been to relieve litigants from that extraordinary expense of moving from one place to another to obtain legal relief. When business corporations attained a nation-wide activity, Congress provided that defendants could be sued wherever found. This eventually became a hardship upon defendants because they were frequently forced to bring their evidence away from the scene of the action to a remote forum and were thereby impoverished in their attempts to protect themselves against litigation.

Section 28 U. S. C. A. 1404(a) was enacted by Congress in order to alleviate this hardship.

Ex Parte Collett, 337 U. S. 55, 93 L. Ed. 1207.
U. S. v. *National City Lines,* 337 U.S. 78, 93 L. Ed. 1226.

It is obvious from these decisions of this Court that the purpose of the statute was to relieve litigants, not to deprive plaintiffs of their rights of action wherever they chose to bring it, but that after the action was brought, it could be transferred to a forum convenient to the defendant.

It must be assumed that when Congress provided for a transfer of a case, it granted the power to the transferee Court to enforce its decrees in the District of original jurisdiction.

It is petitioner's contention that since the goods could have been seized in the District of Indiana, the action could have been brought in the District of Indiana and the case could be transferred to the District of Indiana under Section 1404(a).

II

The secondary question involved in this action is whether or not the parties can waive the forum inasmuch as it is a question of venue and not jurisdiction. In this respect the

decision of the 7th Circuit directly contravenes a decision of the 3rd Circuit on the same question. The 3rd Circuit held that a transfer under 28 U. S. C. A. 1404(a) is a question of venue and can be waived by the parties.

Paramount Pictures v. *Rodney,* 186 Fed. 2d., 111.

The 7th Circuit has held directly to the contrary.

Record Page 28.

This question should be decided by this Court inasmuch as the record shows that the Government entered a specific statement in the record that it made no objection to the transfer and the Indiana District Court submitted the case to a jury without objection, and if this is a matter of venue and not jurisdiction, the waiver of both parties to the venue should have given to the Indiana District the right to hear and decide the action and its conduct in dismissing the action on its own motion should be reviewed by this Court.

Wherefore, petitioner prays that this Court issue its Writ of Certiorari directed to the U. S. Court of Appeals for the 7th Circuit that the decision of that Court in this case be reviewed.

WILLIAM C. BACHELDER,
EUGENE M. FIFE, JR.,
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Attorneys for Petitioner.